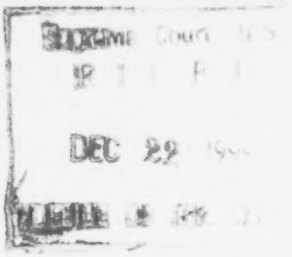

No. 99-883

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

SCOTT BRADLEY; MARY BRAVO; ROBERT DONALDSON; PIMA COUNTY, ARIZONA, a body politic,

Petitioners,

v.

JOHN H. KELLY, in his capacity as Director of Arizona Health Care Cost Containment System; and THE STATE OF ARIZONA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF ARIZONA, DIVISION ONE

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BEST AVAILABLE COPY

I. QUESTIONS PRESENTED

1. Whether Bradley and Donaldson were properly denied coverage for their transplants by the Arizona Health Care Cost Containment System ("AHCCCS") because they were not categorically eligible at the time of their transplants, because they received notice of termination of their SSI benefits but did not appeal to the Social Security Administration, and because AHCCCS is not authorized to make determinations of federal categorical eligibility?

2. Whether Bravo was properly denied coverage of her transplant because she was never categorically eligible, and as a state MN/MI (medically needy/medically indigent) person, was not similarly situated to a categorically eligible person?

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OPINION BELOW

The Memorandum Decision of the Arizona Court of Appeals is an unreported decision numbered 1 CA-CV98-0311. The denial of review by the Arizona Supreme Court is numbered CV99-0131-PR.

GROUNDS FOR JURISDICTION

1. The Court of Appeals of the State of Arizona, Division One, entered its Memorandum Decision on February 23, 1999. (App. 1, Petition for Writ of Certiorari, hereinafter referred to as "Petition").

2. The petition for review to the Arizona Supreme Court to review the decision of the Court of Appeals was denied on August 30, 1999. (Petition, App. 14).

3. The mandate from the Arizona Court of Appeals issued September 20, 1999. (Petition, App. 12).

4. Jurisdiction here is based upon 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

1. 42 U.S.C.S. § 1396(d)(q)(2) (1993) establishes that the "Secretary" makes specific determinations

regarding an individual's impairment, earnings, and eligibility.

2. 42 U.S.C.S. § 1396(d)(q)(2) (Supp. 1998) establishes that the "Commissioner of Social Security" makes determinations as to whether a person is a "qualified severely impaired individual."

3. A.R.S. § 36-2907 (A)(11) (in effect at the time of Bradley's, Donaldson's, and Bravo's transplants) provided:

> A. Unless modified pursuant to subsection H, I, or N of this section, the following health and medical services shall be provided pursuant to provider contracts awarded under this article:
>
> 11. Medically necessary kidney, cornea and bone transplants and immunosuppressant medications for these transplants ordered on prescription by a physician . . .and in addition to other medically necessary transplants and immunosuppressant medications for these transplants ordered on prescription by a physician . . .and allowed as an early and periodic health screening and diagnosis and treatment service for eligible persons . . .No other organ transplants may be covered by the [AHCCCS] system unless specifically required by federal law for persons defined pursuant to § 36-2901, paragraph 4, subdivision (b) [Title XIX categorically eligible].

4. A.R.S. § 36-2907(A)(11)(a), (c) and (d) (as amended subsequent to the plaintiffs' transplants):

A. Unless modified pursuant to this section, the following health and medical services shall be provided pursuant to provider contracts awarded under this article:

11.(a) For individuals eligible for services pursuant to § 36-2901, paragraph 4, subdivision (b) [Title XIX categorically eligible], medically necessary heart, liver, kidney, cornea and autologous and allogenic bone marrow transplants;

(c) For individuals eligible for services pursuant to § 36-2901, paragraph 4, subdivisions (a) ["medically indigent" per state law], (c) ["medically needy" per state law] and (h) [eligible children], medically necessary kidney . . . transplants . . .;

(d) For individuals eligible for services pursuant to § 36-2901, paragraph 4, subdivisions (a), (c) and (h), medically necessary heart, liver . . . transplants . .

STATEMENT OF THE CASE

Of all the cases brought before this Court for review, this must be one of the least significant. This case presents an insular issue unlikely to recur due to a subsequent change in law. The only issue throughout this entire matter is who should pay for the transplant procedures for plaintiffs Bravo, Bradley and Donaldson. Under the law at the time, AHCCCS (the Arizona Health Care Cost Containment System), Arizona's Medicaid agency, was authorized to provide transplants only for federal categorically eligible persons, and these three patients were not categorically eligible; thus, AHCCCS could not provide these procedures. Petitioner Pima County was aware of this; yet, provided the transplant procedures nonetheless and now does not want to bear the financial consequences of its own decision.

Under current law, all three would have been covered for their respective transplants as MN/MI (Medically Needy/Medically Indigent) eligible under the state's voluntary supplement to the Medicaid program. The Arizona state legislature's subsequent decision to cover transplants for those individuals that are not federal categorically eligible renders this case a mere dispute over money between the State of Arizona and Pima County. None of the issues raised by this case will recur here because of the legislative changes.

The Arizona Court of Appeals correctly recognized this, and also correctly recognized the permissible distinction between federal categorical eligibility and state MN/MI eligibility for AHCCCS benefits. Given the facts and the applicable state and federal laws at that time, the Arizona Court of Appeals properly interpreted and applied those laws in determining that there was no authority to "deem" Bradley, Donaldson, or Bravo categorically eligible under any theory.

Bradley: Bradley qualified under the federal Aid to Families With Dependent Children program ("AFDC") and as a result qualified as categorically eligible for AHCCCS benefits beginning March 1, 1993. In August, 1993, Bradley was found eligible by the Social Security Administration ("SSA") for Supplemental Security Income ("SSI") benefits, which were awarded retroactive to March, 1993. At the same time, Bradley was found to be disabled and entitled to Social Security Disability ("SSD") payments as of August, 1993. By virtue of Bradley's eligibility for SSD benefits in August of 1993, he was determined ineligible for SSI and AFDC benefits, and was terminated from those programs. As a result, Bradley lost his categorical eligibility for AHCCCS benefits, and therefore did not qualify for a heart transplant through AHCCCS. Bradley did become eligible for other AHCCCS benefits under the state's supplement to the Medic aid program, known as the Medically

Needy/Medically Indigent ("MN/MI") Program,[1] which did not then cover transplants.

Bradley then applied to Pima County for the transplant. Bradley's request was approved on May 23, 1994, under the Pima County Board of Supervisors' policy providing for payment of transplants by Pima County as the payor of last resort for individuals not otherwise eligible for such transplants through AHCCCS. The Pima County Board of Supervisors determined at the time that Bradley was not categorically eligible, and therefore was not entitled to receive the transplant through AHCCCS.

Bradley received a heart transplant on January 24, 1995. Although Bradley was MN/MI eligible for other AHCCCS benefits at the time of his heart transplant on January 24, 1995, he was not categorically eligible for the transplant.

Donaldson: Donaldson became MN/MI eligible for AHCCCS benefits in September, 1993. Eventually, Donaldson became categorically eligible in June of 1994, retroactive to May of 1994. Beginning November 1, 1994, Donaldson became eligible for SSD benefits which terminated his categorical eligibility for AHCCCS benefits. He thereafter was not eligible for a transplant through AHCCCS.

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[1] The basic categories of eligibility for AHCCCS benefits are codified at A.R.S. § 36-2901(4)(b) (federal categorical eligibility) and A.R.S. § 36-2901(4)(a) and (c) (state MN/MI eligibility) (1a).

Donaldson applied to Pima County for a liver transplant. Donaldson's request was approved under the Pima County Board of Supervisors' policy providing for payment of transplants by Pima County as the payor of last resort for individuals not otherwise eligible for such transplants through AHCCCS. The Pima County Board of Supervisors determined at the time that Donaldson was not categorically eligible, and therefore was not entitled to the transplant through AHCCCS.

On January 24, 1995, Donaldson was given a liver transplant. At the time of his transplant, Donaldson was not categorically eligible, and transplants were not a covered service for him.

Bravo: Bravo was never categorically eligible for AHCCCS benefits. On May 25, 1994, Bravo's request for a transplant was denied by AHCCCS based on the fact that she was not categorically eligible. Bravo applied to Pima County for a transplant. Bravo's request was approved on June 21, 1994, under the Pima County Board of Supervisors' policy providing for payment of transplants by Pima County as the payor of last resort for individuals not otherwise eligible for such transplants through AHCCCS. The Pima County Board of Supervisors determined at the time that Bravo was not categorically eligible, and therefore was not entitled to a transplant through AHCCCS. On November 23, 1994, Bravo received a heart transplant.

ARGUMENT

A. Reasons For Denying the Petition

This Court should exercise its discretion to deny review, because the decision of the Arizona Court of Appeals has no further impact beyond this case. It will not affect the three patients named here: Bradley, Bravo, and Donaldson, because they received their transplants long before this action commenced. It will not affect transplant requests in Arizona, now or in the future. The state legislature has since changed the law, so that persons now who are not federally categorically eligible, but who are state MN/MI eligible, are also eligible to receive transplants. This case, thus, is simply an issue of money between Pima County and the State of Arizona.

Pima County tries to present this as a case about "notice" in an attempt to meet the prerequisites for a Petition for Writ of Certiorari. However, this approach is erroneous. The Social Security Administration ("SSA"), not AHCCCS, determines a person's federal categorical eligibility. The SSA also decides when that eligibility is terminated and sends notice of such termination and appeal rights to the affected person. Both Bradley and Donaldson were clearly notified of their appeal rights by the SSA, yet failed to appeal. With respect to Bravo, she was <u>never</u> categorically eligible, and thus could never have qualified for her transplant through AHCCCS. The Arizona Court of Appeals also properly rejected Pima County's "similarly situated" argument, recognizing the proper distinction between a state's optional supplemental MN/MI coverage and federal categorical eligibility coverage under Title XIX.

Further, the Pima County Board of Supervisors was aware prior to providing these transplants that these three patients were not covered by AHCCCS, and therefore, that any financial burden would necessarily be borne by Pima County. It was only after authorizing these services that Pima County reversed itself and tried to force AHCCCS to reimburse it.

There is no compelling reason for this Court to accept review of this matter. Because of the legislative changes, this decision has no impact on future requests for transplants. This matter has significance only to Petitioner Pima County, which would like to avoid the consequences of its own decisions. These reasons clearly are insufficient for granting the Petition for Writ of Certiorari, and it should thus be denied.

B. Misstatements of Fact and Law in the Petition

1. Petitioners misstate the law to the extent they imply AHCCCS had a duty, statutory or otherwise, to notify Bradley and Donaldson of other ways by which they could attempt to continue their federal categorical eligibility. (Petition, pp. 4 and 5).

2. Petitioners misconstrue and misstate the law by claiming that AHCCCS, a state agency, is authorized to make determinations regarding a person's social security assistance eligibility status, when this authority lies with the

Secretary (and now the Commissioner) of the Social Security Administration. (Petition, p. 14; 42 U.S.C.S. § 1396d(q)(2)(1993) and 42 U.S.C.S. § 1396d(q)(2)(Supp., 1998).

3. Petitioners misstate and misrepresent the facts and proceedings below by asserting that the issue of whether organ transplants are a "required service under Medicaid statutes or regulations for categorically eligible persons" is properly raised here. To the contrary, this issue was never raised below, is not properly before this Court, and should not be considered in the event review is granted. (Petition, pp. 14-15). In fact, until now Petitioners have consistently argued that the three patients either were categorically eligible or should have been "deemed" categorically eligible.

C. Bradley and Donaldson Did Receive Notice of their Appeal Rights

Petitioners argued below that Bradley and Donaldson should have been "deemed" categorically eligible, even though they were not, on the basis that they allegedly did not receive a "JASSO" notice from AHCCCS. The Arizona Court of Appeals properly rejected this argument because Bradley and Donaldson did, in fact, receive notice of termination of their SSI benefits and their appeal rights[2]. The

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[2] Bravo was never entitled to receive such a notice because she was never categorically eligible.

Court of Appeals correctly found that: (1) both Bradley and Donaldson did receive notice from the SSA, informing them that they were no longer categorically eligible and of their appeal rights; and (2) there is no authority to "deem" Bradley and Donaldson eligible when the controlling law at that time provides they were not.

Pima County argued that the only way to rectify AHCCCS's alleged error is to deem both Bradley and Donaldson categorically eligible, apparently for all purposes and for some undetermined length of time. Even assuming AHCCCS did not send the JASSO notices, there is no authority for Petitioners' proffered remedy of "deeming" them categorically eligible.

Bradley was provided formal notice of his termination of SSI benefits from the SSA, along with his appeal rights. As a part of the notice of termination of benefits, Bradley was told:

> Since you are not eligible now for SSI, you are also not eligible now for Medicaid based on SSI. However, if you need help with medical bills, you may still be eligible for medical assistance. Also, you may be eligible for Medicaid for the months we paid you SSI.

> Contact the Arizona Health Care Cost Containment System (AHCCCS) Administrator for information about your State's medical assistance programs and your eligibility for Medicaid. When you visit that agency, please take this letter with you. It will help the people there answer your questions.

That notice also outlined in detail Bradley's appeal rights:

> If you disagree with the decision, you have the right to appeal. We will review your entire case, even the parts you agree with. We also will consider any new facts you have and then will make a new decision. . .
>
> - You have 60 days to ask for an appeal.
> - The 60 days start the day after you receive

his letter. We assume you got this letter 5 days after the date on it unless you show us you did not get it within the 5-day period.

- You must have a good reason for waiting more than 60 days to ask for an appeal.

- To appeal, you must fill out a form called "Request for Reconsideration." The form number is SSA-561. To get this form, contact one of our offices. We can help you fill out the form.

The notice also explains the different ways to appeal (Case Review or Informal Conference), what to do "If You Want

Help With Your Appeal," and where to call and/or write with any questions.

Bradley was thus not deprived of notice of his right to appeal the determination made by the SSA, and there was no due process violation. Further, to regain his federal categorical eligibility, Bradley would have had to successfully appeal the termination of his SSI benefits, which is an appeal to the SSA. See Disabled Rights Union v. Kizer, 744 F.Supp. 221 (C.D.Cal. 1990). Bradley never appealed to the SSA.

Donaldson was also given specific notice of his termination of benefits and his appeal rights and the fact that continued federal categorical eligibility was necessary for coverage of his transplant. Donaldson did not challenge the termination of benefits. Pima County, having knowledge of the circumstances, did nothing to challenge the SSA's decision. Under these circumstances, neither Pima County nor Donaldson can fairly claim that there is a logical nexus between the alleged failure to send a JASSO notice to Donaldson and the state's denial of his transplant in January of 1995, as the Court of Appeals properly decided.

Pima County's own witness at the administrative hearing, Ms. Norma Stephens, the County's eligibility administrator, testified unequivocally that any failure to send the required JASSO notices had no bearing on whether Bradley and Donaldson should have been afforded coverage of their respective transplants. Pima County's representative at the hearings before AHCCCS, William Cole, confirmed that nothing that AHCCCS did, or did not do, affected the fact that these patients were not categorically eligible at the

time of their transplants. Having conceded that AHCCCS' alleged failure to send a JASSO notice to Bradley and Donaldson has no significance regarding whether these individuals are entitled to coverage, Pima County's position is specious, at best, as the Court of Appeals recognized.

Petitioners misconstrue the AHCCCS regulation at Arizona Administrative Code ("A.A.C.") R9-22-341. (Petition, p. 12 and App. 54). As the title makes clear, this regulation addresses the processing of a person's state MN/MI application once that person loses his federal categorical eligibility as a result of the SSA's action terminating that person's SSI benefits. The regulation prioritizes the processing of these applications so that a person may become eligible at least for state MN/MI benefits as soon as possible, even though the person is no longer eligible for the federal categorical benefits. Nowhere in that regulation, or anywhere else, is AHCCCS (a state agency) authorized to make determinations regarding a person's federal categorical eligibility – a determination authorized to be made only by the Secretary of the SSA (a federal agency) pursuant to federal statute.[3] Notwithstanding the fact that Petitioners misconstrue that regulation, the mere suggestion that a state agency's own regulation could somehow supersede a federal

[3] As the Arizona Court of Appeals noted, the statute has been amended to provide that the "Commissioner of Social Security" must now make such determinations. 42 U.S.C.S. § 1396d(q)(2)(Supp. 1998); Petition, App. 5, fn. 2.

statute is absurd. The Court of Appeals properly rejected this argument.

No evidence was presented at the administrative hearing that Bradley or Donaldson would have, or could have, done anything to prevent their eligibility status from changing from federally categorical eligibility to state MN/MI eligibility. They were given notice of termination of their federal benefits, and hence their categorical eligibility, and nothing was done that changed their respective eligibility status. The individual patients did not testify and, thus, there is no evidence that they would have done anything differently had they received a JASSO notice. Without any evidence that the alleged failure to provide a JASSO notice resulted in prejudice to Bradley and Donaldson, they are not entitled to any relief. See People ex rel. Hartigan v. Peters, 871 F.2d 1336, 1340 (7th Cir. 1989).

D. The Court of Appeals Properly Found Bravo Not "Similarly Situated" to Categorically Eligible Recipients

Pima County's faulty "similarly situated" argument arises from the language of 42 U.S.C.S. § 1396b(i) and two cases, relied upon by Pima County, that discuss the issue in far different contexts, Dexter v. Kirschner, 984 F.2d 979 (9th Cir. 1992) and Salgado v. Kirschner, 179 Ariz. 301, 878 P.2d 659 (1994). The plain language of the statute evidences the problem with Pima County's argument, and the cases relied upon are inapposite.

Pima County's argument regarding "similarly situated" individuals misses the point. The statute, 42 U.S.C.S. § 1396b(i), pertains solely to conditions upon which payment will be made by the federal government to the state and, hence, has no relevance or application to state MN/MI eligibility. It is clear, based on the terms of the statute, that the conditions tied to funding of transplants are conditions upon which payment will be made by the federal government to the state. See Dexter, 984 F2d. at 983. The term "similarly situated" is a specifically defined term of art in the federal context, which refers to treating members within the same eligibility group (i.e. categorically eligible members) alike. It does not refer to treating members of different eligibility groups (i.e. federal categorically eligible versus state MN/MI eligible) the same; otherwise, it would make no sense to draw distinctions between different eligibility groups.

The federal government provides no funding for the services provided to the state's MN/MI population. Thus, restrictions or conditions placed on the funding of transplants for federal categorically eligible recipients (i.e., that similarly situated individuals be treated alike) have no bearing on the decision to limit transplant coverage to that class. In this case, these individuals were not categorically eligible and, thus, the restrictions or conditions placed upon the funding of transplants for that eligibility population are inapplicable. Because Dexter and Salgado deal only with the federal categorically eligible group and do not make comparisons with the state MN/MI group, both cases are inapplicable.

The federal "similarly situated" requirements of §1396b(i) are addressed only to those who are federal categorically eligible. It is the State of Arizona that has voluntarily addressed the needs of its MN/MI population. By virtue of all the above, the Court of Appeals correctly found that Bravo is not "similarly situated" to a categorically eligible recipient, especially when she clearly was never categorically eligible.

CONCLUSION

This case does not raise significant issues nor will it have an impact on any other transplant request in Arizona because of subsequent changes in the law made by the Arizona state legislature. The Arizona Court of Appeals gave due consideration to the issues and properly addressed them. The Arizona Supreme Court apparently recognized this as well, and properly denied review. There is no reason for this Court to conduct further review, and this Petition should therefore be denied.

Respectfully submitted,

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APPENDIX A- A.R.S. § 36-2901. Definitions

In this article, unless the context otherwise requires:

* * *

4. (a) "Eligible person" means any person who is: Classified as an indigent pursuant to § 11-297.

(b) Under federal law any of the following:

(i) Defined as mandatorily eligible pursuant to title XIX of the social security act (P.L. 89-97; 79 Stat. 344; 42 United States Code section 1396a (1980)).

(ii) Beginning October 1, 1986, under the age of eighteen years and defined as optionally eligible pursuant to title XIX of the social security act (P.L. 89-97; 79 Stat. 344; 42 United States Code sections 1396a(a)(10)(A)(ii)(I) and 1396d(a)(i)).

(iii)Defined as an eligible pregnant woman, and an infant under the age of one year, pursuant to § 1902(*l*)(1)(A) and (B) of title XIX of the social security act, as amended by § 4603 of

Appendix A

the omnibus budget reconciliation act of 1990, and whose family income does not exceed one hundred forty percent of the federal poverty guidelines as published by the United States department of health and human services and children defined as eligible children who have not attained nineteen years of age pursuant to § 1902(*l*)(1)(D) of title XIX of the social security act, as amended by the § 4601 of the omnibus budget reconciliation act of 1990, and whose family income does not exceed one hundred percent of the federal poverty guidelines as published by the United States department of health and human services, and children defined as eligible pursuant to § 1902(*l*)(1)(C) of title XIX of the social security act, as amended by § 6401 of the omnibus budget reconciliation act of 1989, and whose family income does not exceed one hundred thirty-three percent of the federal poverty guidelines as published by the United States department of health and human services.

(iv) Defined as optionally eligible pursuant to section 1902(a)(10)(A)(ii)(I) of the social security act (42 United States Code §1396a(a)(10)(A)(ii)(I)).

Appendix A

(c) Classified as a medically needy person pursuant to this article.

APPENDIX B- [Current] A.R.S. § 36-2907. Covered health and medical services; definitions; modifications; related delivery of service requirements

A. Unless modified pursuant to this section, the following health and medical services shall be provided pursuant to provider contracts awarded under this article:

* * *

11. Transplants as authorized in this paragraph that are medically necessary and not experimental, as determined by the administration. The following transplants are authorized:

(a) For individuals eligible for services pursuant to § 36-2901, paragraph 4, subdivision (b), medically necessary heart, liver, kidney, cornea and autologous and allogenic bone marrow transplants and immunosuppressant medications for these transplants ordered on prescription by a physician licensed pursuant to title 32, chapter 13 or 17.

Appendix B

(b) For individuals eligible for services pursuant to § 36-2901, paragraph 4, subdivision (b), medically necessary lung and heart-lung transplants and immunosuppressant medications for these transplants ordered on prescription by a physician licensed pursuant to title 32, chapter 13 or 17 but only if monies are available pursuant to § 36-2921, subsection A, paragraph 1.

(c) For individuals eligible for services pursuant to § 36-2901, paragraph 4, subdivisions (a), (c) and (h), medically necessary kidney and cornea transplants and immunosuppressant medications for these transplants ordered on prescription by a physician licensed pursuant to title 32, chapter 13 or 17.

(d) For individuals eligible for services pursuant to § 36-2901, paragraph 4, subdivisions (a), (c) and (h), medically necessary heart, liver, heart-lung, lung and autologous and allogenic bone marrow transplants and immunosuppressant medications for these transplants ordered on prescription by a physician licensed

Appendix B

pursuant to title 32, chapter 13 or 17, but only if monies are available pursuant to § 36-2921, subsection A, paragraph 1.

(e) For persons who are eligible for services pursuant to § 36-2901, paragraph 4, subdivision (a), (b), (c) and (h), any other transplant authorized by the director but only if monies are available pursuant to § 36-2921, subsection A, paragraph 1.

APPENDIX C- [Former] A.R.S. § 36-2907. Covered health and medical services; definitions; modifications; related delivery of service requirements

Unless modified pursuant to subsection H, I or N of this section, the following health and medical services shall be provided pursuant to provider contracts awarded under this article:

* * *

11. Medically necessary kidney, cornea and bone transplants and immunosuppressant medications for these transplants ordered on prescription by a physician licensed pursuant to title 32, chapter 13 or 17 and in addition to other medically necessary transplants and immunosuppressant medications for these transplants ordered on prescription by a physician licensed pursuant to title 32, chapter 13 or 17 and allowed as an early and periodic health screening and diagnosis treatment service for eligible persons under the age of twenty-one years and defined as eligible pursuant to § 36-2901, paragraph 4, subdivision (b) if federal financial participation is available under title XIX of the social security act for this service above the prepaid capitation amount for that person. No other organ transplants may be covered by the system unless specifically required by federal law for per

sons defined pursuant to § 36-2901, paragraph 4, subdivision (b).